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Nos. 99-1462 and 99-1745

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

CITY OF FORT WORTH, TEXAS,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

AMERICAN AIRLINES, INC.,

Petitioner,

v.

THE UNITED STATES DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT SOUTHWEST AIRLINES CO. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "proprietary powers and rights" exception to complete federal preemption under the Airline Deregulation Act of 1978 authorizes the City of Dallas, as owner of Love Field, to deny access to Love Field for flights specifically authorized by subsequent federal statutes?

2. Whether litigation in a state court involving some but not all of the parties to a controversy, and some but not all of the issues in dispute, can prevent a federal agency from interpreting a federal statute which it is charged with administering?

PARTIES TO THE PROCEEDING

The following is a list of parties that participated in the proceeding in the United States Court of Appeals for the Fifth Circuit.

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RULE 29.6 STATEMENT

Respondent Southwest Airlines Co. is a corporation whose stock is publicly traded. It has no parent company and no publicly traded company owns 10% or more of its outstanding stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT v

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES vii

STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

I. THE LOVE FIELD LITIGATION 3

II. PASSAGE OF THE WRIGHT AMENDMENT ... 6

III. PASSAGE OF THE SHELBY AMENDMENT .. 7

IV. FORT WORTH'S LAWSUIT 8

V. THE DOT PROCEEDING BELOW 10

VI. THE FIFTH CIRCUIT DECISION 12

ARGUMENT 13

I. THE FIFTH CIRCUIT CORRECTLY DECIDED THE ISSUE OF ADA PREEMPTION 13

II. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR THE COURT'S CONSIDERATION OF THE SCOPE OF ADA PREEMPTION, BECAUSE OF THE UNIQUE ATTENTION OF CONGRESS TO LOVE FIELD 20

III. THE DOT HAD THE LEGAL AUTHORITY TO HOLD ITS INTERPRETATION PROCEEDING AND TO ISSUE DECLARATORY RULINGS ON THE QUESTIONS RAISED 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Alaska Airlines, Inc. v. Long Beach, 951 F.2d 977 (9th Cir. 1991) 14

American Airlines, Inc. v. Department of Transportation, 202 F.3d 788 (5th Cir. 2000) ..... *passim*

Arapahoe County Public Airport v. Centennial Express Airlines, Inc., 956 P.2d 587 (Colo. 1998) 19, 20

Bath Iron Works Corp. v. Director, OWCP, 125 F.3d 18 (1st Cir. 1997) 28, 29

British Airways Bd. v. Port Authority, 564 F.2d 1002 (2nd Cir. 1977) 13, 14

Burbank-Glendale-Pasadena Airport Authority v. Los Angeles, 979 F.2d 1338 (9th Cir. 1992) 16

City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) 16

City of Dallas v. Southwest Airlines Co., 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974) 4, 5, 18

City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982) 17

Continental Air Lines, Inc. v. Department of Transportation, 843 F.2d 1444 (D.C. Cir. 1988) 6, 25

Cramer v. Skinner, 931 F.2d 1020 (5th Cir.), *cert. denied*, 502 U.S. 907 (1991) 8

Dairyland County Mutual Insurance Co. v. Childress, 650 S.W.2d 770 (Tex. 1983) 27

Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9 (1st Cir. 1987) 26

TABLE OF AUTHORITIES – Continued

Page(s)

Kansas v. United States, 16 F.3d 436 (D.C. Cir.), *cert. denied*, 513 U.S. 945 (1994) 8

Legend Airlines, Inc., et al. v. City of Fort Worth, et al., ___ S.W.2d ___ (Tex. App. – Ft. Worth 2000) (Cause No. 2-99-098-CV, May 25, 2000) 9

Matsushita Electric Industrial Co., Ltd. v. Epstein, 516 U.S. 367 (1996) 27

Midgett v. United States, 603 F.2d 835 (Ct. Cl. 1979).. 28, 29

Midway Airlines, Inc. v. County of Westchester, 584 F. Supp. 436 (S.D. N.Y. 1984) 14

NLRB v. Yellow Freight Systems, Inc., 930 F.2d 316 (3d Cir. 1991) 27

National Helicopter Corp. v. City of New York, 137 F.3d 81 (2nd Cir. 1998) 15

New England Legal Foundation v. Massachusetts Port Authority, 883 F.2d 157 (1st Cir. 1989)..... 26

Northwest Airlines, Inc. v. County of Kent, Michigan, 510 U.S. 355 (1994) 25, 26

San Diego Unified Port District v. Gianturco, 651 F.2d 1306 (9th Cir. 1981)..... 16

San Francisco v. FAA, 942 F.2d 1391 (9th Cir. 1991) 14

Southwest Airlines Co. v. Texas International Airlines, Inc., 396 F. Supp. 678 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) 5

Torres v. Gardner, 270 F. Supp. 1 (D.P.R. 1967) 29

Town of Deerfield v. FCC, 992 F.2d 420 (2d Cir. 1993) 28

Western Air Lines v. Port Authority of New York and New Jersey, 658 F. Supp. 952 (S.D. N.Y. 1986), *aff'd*, 817 F.2d 222 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988)..... 13, 14, 15

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES

28 U.S.C. § 1738 ..... 1, 12, 26, 27

49 U.S.C. § 41713(b) 1, 12, 13

Airline Deregulation Act, Pub. Law 95-504 (1978) ...1, 5

Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) [the Shelby Amendment] ..... *passim*

International Air Transportation Competition Act of 1979, Pub. L. 906-192, 94 Stat. 35, 48 (1980) [the Wright Amendment] ..... *passim*

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 105-313 (1997) 24

Senate Conference Report No. 96-531, 96th Cong. 1st Session 6, 21

AGENCY PROCEEDINGS

CAB Order 79-9-192 (Sept. 28, 1979) 22

Centennial Express Airlines v. Arapahoe County Public Airport Authority, FAA Docket No. 16-98-05 (*aff'd*, FAA Order 1999-1, February 18, 1999) ...19, 26

Love Field Amendment Proceeding, DOT Docket 43307 Order 85-12-81 (December 31, 1985) 6

Love Field Amendment Proceeding, DOT Docket OST-98-4363 Order 98-8-29 (August 25, 1998)..... 10

Order 98-12-27 (December 22, 1998)..... 11, 16, 17, 18

TABLE OF AUTHORITIES – Continued

Page(s)

Southwest Airlines Automatic Market Entry Investigation, CAB Docket, 34582 Order 79-6-187, CAB Dockets 33777, *et al.* (June 28, 1979)..... 6

BRIEF OF RESPONDENT SOUTHWEST AIRLINES CO. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Respondent Southwest Airlines Co. ("Southwest") respectfully files this Brief in Opposition to the Petition for a Writ of Certiorari of Petitioner City of Fort Worth, Texas ("Fort Worth") in Cause No. 99-1462, and in opposition to the Petition for a Writ of Certiorari of American Airlines, Inc. ("American") in the related Cause No. 99-1745. The sole question presented by American in its petition is also one of the three questions in Fort Worth's petition. Southwest will deal in this Brief with both parties' statements of that common issue, as well as one of the additional questions raised by Fort Worth.

STATUTORY PROVISIONS

The relevant statutory provisions appear in the Appendix to this Brief beginning at page 1a. Those provisions are:

1. Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 906-192, 94 Stat. 35, 48 (1980) [the Wright Amendment];

2. Sections 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) [the Shelby Amendment];

3. Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 22 Stat. 1705 (1978), codified at 49 U.S.C. § 41713(b); and

4. 28 U.S.C. § 1738.

STATEMENT OF THE CASE

As Southwest has noted in its Response to the Cross-Petition for a writ of certiorari filed by the Dallas-Fort Worth International Airport Board ("DFW Airport Board") in this matter, Cause No. 99-1739, the decisions of the Department of Transportation and the Fifth Circuit now at issue do raise one legitimate question for consideration here – the upsetting by the action below of the carefully crafted scheme of Congress for the distribution of air service in North Texas by the authorization of single-ticketing out of Love Field in Dallas for flights beyond the congressionally prescribed Love Field Service Area. However, one of the very reasons making that question appropriate for resolution here – the significant and explicit involvement of Congress in the management of interstate air traffic out of Love Field – makes this case unsuited for the attention of this Court on the matters presented by the other petitioners.

Specifically, what American calls "the single important issue presented by the decision below"[1] – preemption of local authority by the Airline Deregulation Act of 1978 (the "ADA") – is particularly inappropriate for a general consideration in the context of Dallas and Love Field. For, not only was the matter correctly decided by the Department of Transportation ("DOT") and the Fifth Circuit, it was decided in the context of the most congressionally overseen and directed municipal airport in the country. Some general resolution of the "proprietary powers" issue or some overarching statement of this

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[1] Petition of American Airlines, Inc. for a Writ of Certiorari, Cause No. 99-1745, p. 3 (Am. Pet. 3).

Court on preemption by the ADA, even if the first were thought possible or the second desirable at this time, could not come out of the Dallas situation, given its unique statutory history.

Similarly, the issue which Fort Worth seeks to raise in its Question 3, having to do with preclusion in federal agency proceedings, does not warrant consideration by this Court, both because of the correctness of the decisions below and the particular history of the litigation at issue.[2]

Because the legislative and judicial background against which the DOT and the court of appeals acted is so important for understanding both the correctness of those decisions and their limited impact on other situations, a review of the history of Love Field is appropriate.

I. THE LOVE FIELD LITIGATION

In 1968, after years of sparring over which local airport should be designated to serve the needs of the Dallas-Fort Worth region, the Cities of Dallas and Fort Worth agreed to construct a *new* Dallas-Fort Worth Regional Airport ("DFW") midway between the two cities. For that purpose the cities adopted a Regional Airport Concurrent Bond Ordinance (the "Bond Ordinance"), Section 9.5A of which provided that the Cities:

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[2] Fort Worth's second question for review concerns a matter – the "use agreements" by which certain carriers other than Southwest committed to fly exclusively out of DFW – on which Southwest took no position before the DOT, in the Fifth Circuit or in its Response in Cause No. 99-1739, and on which it takes no position here.

> . . . shall take such steps as may be necessary, appropriate and legally permissible (without violating presently outstanding legal commitments or covenants prohibiting such action), to provide for the orderly, efficient and effective *phase-out at Love Field,* Redbird, GSIA and Meacham Field, *of any and all Certificated Air Carrier Services,* and to transfer such activity to the Regional Airport effective upon the beginning of operations at the Regional Airport.

City of Dallas v. Southwest Airlines Co., 371 F. Supp. 1015, 1020 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974) (emphasis added). In 1970, the principal airlines then serving the Dallas-Fort Worth area signed agreements to serve DFW Airport, and in 1974 moved all their flights from Love Field and other local airports to the newly-opened DFW Airport. 371 F. Supp. at 1020-21.

On June 18, 1971, Southwest Airlines began service as an intrastate airline certificated by the Texas Aeronautics Commission, serving routes from Dallas Love Field to Houston and San Antonio, Texas. In October 1971, Southwest advised the DFW Airport Board that it did not intend to serve DFW. Dallas, Fort Worth and the DFW Airport Board subsequently filed a lawsuit in federal court, seeking a declaration of their right under federal and state law to exclude Southwest from Love Field. Southwest counterclaimed, seeking a declaration of its right under federal and state law to remain at Love Field.

In an exhaustive opinion, the district court resoundingly rejected the position of the cities and the DFW Airport Board that they could exclude Southwest from Love Field. Relying on both federal and state law

grounds, the court ruled that Southwest's Love Field service could not be barred by Section 9.5 of the Concurrent Bond Ordinance and that "the exclusion of Southwest Airlines from Love Field would not be legally permissible." 371 F. Supp. at 1035. The Fifth Circuit affirmed this decision on the state law grounds, finding it unnecessary to reach the federal questions; and this Court denied certiorari. *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773, 777 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).[3]

As a consequence of the federal court decisions, Southwest operated out of Love Field, as an intrastate carrier, during most of the 1970's. In 1978, however, Congress passed the Airline Deregulation Act, Pub. Law 95-504 (1978), dramatically liberalizing the route entry and pricing freedom of commercial air carriers. In January 1979, Southwest filed an application with the U.S. Civil Aeronautics Board ("CAB") for authority to fly between Dallas (Love Field) and New Orleans under the Automatic Market Entry ("AME") provisions of the Airline Deregulation Act. Fort Worth, Dallas, the DFW Airport Board, American Airlines, Congressman Jim Wright (then House Majority Leader and representative from Fort Worth), and others acting in concert with them filed objections to Southwest's application with the CAB. However, the CAB awarded Southwest permanent

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[3] This defeat did not deter the Cities of Dallas and Fort Worth, the DFW Airport Board, or the DFW air carriers from other efforts to expel Southwest from Love Field. Each attempt, however, was rebuffed by the federal courts. *See, e.g., Southwest Airlines Co. v. Texas International Airlines, Inc.*, 396 F. Supp. 678 (N.D. Tex. 1975), *aff'd*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

authority in the Dallas (Love Field) – New Orleans market in 1979. Order 79-6-187, CAB Dockets 33777, *et al.* (June 28, 1979).

II. PASSAGE OF THE WRIGHT AMENDMENT

Their failure before the Civil Aeronautics Board prompted the Dallas/Fort Worth parties to turn to Congress, in an effort to change the law and to restrict service at Love Field. Majority Leader Wright offered an amendment to an unrelated aviation bill under consideration by the House, which would have *prohibited*, as a matter of federal law, *all commercial interstate air service* at Love Field. The Senate failed to agree to this amendment, however, and the matter was referred to a conference committee.[4] After lengthy negotiations, a legislative compromise was struck. This legislation, known as the Wright Amendment (Section 29 of the International Air Transportation Competition Act of 1979, Public Law 96-192), was described by the Conference Committee as "a fair and equitable settlement for a dispute that has raged in the Dallas/Fort Worth area for many years." Senate Conference Report No. 96-531, 96th Cong. 1st Session, at 24.

Subsection (a) of the Wright Amendment prohibited (except as provided in subsection (c) of the Amendment) the federal government from authorizing any interstate service at Love Field, except for a small quota of charter

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[4] *See* discussion in the Department of Transportation's *Love Field Amendment Proceeding*, Order 85-12-81 at 3 (December 31, 1985) (DFW Airport Board Pet. App. 11), *aff'd, Continental Air Lines v. Department of Transportation*, 843 F.2d 1444 (D.C. Cir. 1988).

flights and an allowance for commuter air carriers operating aircraft with no more than 56 seats. Subsection (b) allowed Southwest to continue its existing interstate (New Orleans) service at Love Field, but prohibited airlines from offering other interstate services at Love Field except as specifically authorized by the Wright Amendment.

Subsection (c) carved out an exception to the ban on interstate service from Love Field involving planes with more than 56 seats. In subsection (c), Congress found it "consistent with the public convenience and necessity to authorize" carriers to provide service on planes of any size, including large jets, between Love Field and points in the four states contiguous to Texas (Louisiana, Arkansas, Oklahoma, and New Mexico). This authorization was made subject to two additional restrictions, to ensure that airlines could not evade the law's intent to maintain Love Field as a "short-haul" airport. Under the Wright Amendment, subsection (c), an air carrier can offer the interstate service within the designated five state area provided: (1) the air carrier does not offer through service or ticketing with another air carrier; and (2) the air carrier "does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside [the five-state service area]."

III. PASSAGE OF THE SHELBY AMENDMENT

For almost 18 years the Wright Amendment governed and dictated the permissible air service from Love Field. The constitutionality of the Wright Amendment was upheld by courts of appeals as a legitimate exercise of the plenary power of Congress to regulate interstate

commerce. *Kansas v. United States*, 16 F.3d 436 (D.C. Cir.), *cert. denied*, 513 U.S. 945 (1994); *Cramer v. Skinner*, 931 F.2d 1020 (5th Cir.), *cert. denied*, 502 U.S. 907 (1991).

As an act of Congress, however, the Wright Amendment was subject to modification by that body. In 1997, Senator Richard Shelby of Alabama, Chairman of the Senate Appropriations Committee, added an amendment to an otherwise unrelated aviation appropriations bill (the "Shelby Amendment"), which expanded the permissible geographic scope of service from Love Field to include three additional states: Kansas, Alabama, and Mississippi. The Shelby Amendment also modified the Wright Amendment to define the term "passenger capacity of 56 passengers or less" to include large aircraft (300,000 pounds or less gross weight), reconfigured to accommodate 56 or fewer passengers. Public Law 105-66, § 337 (1997). The Shelby Amendment became law on October 27, 1997.

IV. FORT WORTH'S LAWSUIT

Promptly after Congress passed the Shelby Amendment (but before the President signed it), the City of Fort Worth filed suit in the 48th Judicial District Court of Tarrant County, Texas seeking a declaratory judgment that the City of Dallas was contractually obligated to Fort Worth to prevent any air carrier from taking advantage of the Shelby Amendment. In addition to the City of Dallas, Forth Worth joined as defendants in Texas state court certain air carriers that were viewed as potential users of Love Field. It did not join the DOT, the agency responsible for administering the Wright and Shelby Amendments; nor did it join Southwest, the primary air carrier

at Love Field. Indeed, when certain of the defendants sought to add Southwest and the DOT to the proceeding as necessary parties, Fort Worth and the Intervenor Plaintiff American Airlines, Inc. succeeded in having them stricken from the suit.[5]

On October 15, 1998, the state district court granted a partial summary judgment for Fort Worth and its litigation allies, American Airlines and the DFW Airport Board, against Dallas, Continental Express, Inc. and Legend Airlines, Inc. In a brief order that did not include a supporting opinion, the court ruled that Dallas was obligated by the 1968 Concurrent Bond Ordinance to bar airlines at Love Field from operating additional services authorized by the Shelby Amendment and that federal law did not override the cities' agreement to restrict Love Field service. On December 16, 1998, the court made its judgment final. *See* FW Pet. App. 178.

On May 25, 2000, the Court of Appeals for the Second District of Texas at Fort Worth reversed the judgment of the district court and rendered a judgment denying the declaratory relief sought by the City of Fort Worth and American Airlines.[6] The state court of appeals held, in agreement with the Fifth Circuit here, that the restrictions on Love Field air passenger service contained in the Bond Ordinance are preempted by the ADA.

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[5] Volume 10 of the Record on Appeal 110.

[6] The Judgment of the Court of Appeals for the Second District of Texas at Fort Worth in Cause No. 2-99-098-CV, *Legend Airlines, Inc., et al. v. City of Fort Worth, et al.* appears in the Appendix to this Brief at page 5a.

V. THE DOT PROCEEDING BELOW

In August 1998 while Fort Worth's lawsuit was pending, the DOT instituted the *Love Field Service Interpretation Proceeding*, in order to "issue a ruling on the major federal law issues raised by the dispute" in the state court proceeding. DOT Order 98-8-29 at 1, August 25, 1998. The Department explained that, as the agency primarily responsible for administering the relevant statutes, it had a responsibility to rule on the federal issues underlying the Texas litigation, much as the Department had done in 1985 in the *Love Field Amendment Proceeding, supra*, n.4. The Department therefore requested comments from interested parties on five issues of federal law. Fort Worth Petition Appendix [FW Pet. App.] 53, 80-81. DOT Orders 98-8-29 and 98-9-5 (September 3, 1998).

On December 22, 1998, after receiving a large volume of comments by the parties who are now before this Court, as well as by other interested parties, the Department ruled on the five issues as follows:

> (1) The City of Dallas' proprietary powers as owner of Love Field do not allow it to bar air carriers from operating services authorized by the Shelby Amendment, and thus Fort Worth may not enforce contractual claims against Dallas that would force it to do otherwise.
>
> (2) Under the federal aviation preemption provision, the Wright and Shelby Amendments preempt any agreement between Dallas and Fort Worth to restrict air service at Love Field that is permitted by those Amendments.
>
> (3) The Shelby Amendment allows an airline to operate long-haul service from Love Field with

any aircraft having no more than 56 seats, including regional jets.

(4) The DFW use agreements may not be enforced to block a DFW signatory airline from offering interstate service at Love Field that is permitted by the Wright and Shelby Amendments.

(5) The Wright Amendment permits Continental Airlines and its subsidiary Continental Express to offer through service and ticketing from Love Field to points outside Love Field service area via Houston, so long as their flights from Love Field to Houston use aircraft with 56 seats or less.

See Order 98-12-27 (FW Pet. App. 53, 145-46).

The City of Fort Worth and the DFW Airport Board petitioned the DOT for reconsideration of its rulings on Issues One through Four. With respect to the question of preemption by the ADA and the Wright and Shelby Amendments, Fort Worth and the Airport Board argued that the DOT was precluded from deciding the question by the contrary summary judgment decision of the state district judge in the Fort Worth lawsuit. The DOT rejected this argument and issued an Order on Reconsideration that affirmed its prior rulings.[7]

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[7] The Order on Reconsideration, No. 99-413, is publicly available at 1999 WL 218767 (D.O.T.). It is also reprinted in the Appendix to the Petition for a Writ of Certiorari filed by American Airlines, Inc. at 128a.

VI. THE FIFTH CIRCUIT DECISION

Various of the parties to the DOT proceeding petitioned the United States Court of Appeals for the Fifth Circuit challenging some or all of the decisions on the five issues.[8] In its decision, the Fifth Circuit denied all of the petitions for review and affirmed the DOT Orders. *American Airlines, Inc. v. Department of Transportation*, 202 F.3d 788 (5th Cir. 2000) (FW Pet. App. 53). The court of appeals considered and rejected the arguments of the City of Fort Worth, American and the DFW Airport Board that either the full faith and credit statute, 28 U.S.C. § 1738, or federal common law rules of preclusion foreclosed the DOT's consideration of the ADA or of the Wright and Shelby Amendments. 202 F.3d at 799-800 (FW Pet. App. 17-23). On the issue of the preemption of Section 9.5A of the Bond Ordinance, the Circuit held that the restrictions on Love Field operations imposed by that section constitute regulations which relate to routes, within the meaning of 49 U.S.C. § 41713(b)(1), the federal preemption provision of the ADA. 202 F.3d at 805 (FW Pet. App. 33). The court then held that, under the circumstances of Love Field and the DFW Airport, the Bond Ordinance ban on Love Field flights went beyond any exercise of proper local proprietary powers that had ever been upheld in the federal case law, 202 F.3d at 807 (FW Pet. App. 37), and that it was a preempted exercise of local regulation over interstate air routes. 202 F.3d at 808 (FW Pet. App. 38-39).

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[8] Southwest filed a petition in the Fifth Circuit seeking review of the DOT's decision on Issue Five – single-ticketing. That question is a subject of the DFW Airport Board's Cross-Petition in No. 99-1739.

With respect to the effect of the Wright and Shelby Amendments on the power of the City of Dallas to regulate interstate air travel at Love Field, the court of appeals held it unnecessary to consider whether those statutes "impliedly preempt the cities' ability to enforce the Ordinance," having found express preemption under the ADA. 202 F.3d 808, n.17 (FW Pet. App. 39).

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY DECIDED THE ISSUE OF ADA PREEMPTION.

It is elementary that "airport proprietors have an 'extremely limited role' in the system of aviation regulation." *Western Air Lines v. Port Authority of New York and New Jersey*, 658 F. Supp. 952, 955 (S.D. N.Y. 1986), *aff'd*, 817 F.2d 222 (2nd Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), quoting *British Airways Bd. v. Port Authority*, 564 F.2d 1002, 1010 (2nd Cir. 1977). Even before passage of the ADA, with its express preemption of local regulation of "price, route, or service,"[9] it was recognized that

> . . . the airport operator is circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules that advance the local interest. The Court must "carefully scrutinize all exercises of local powers under this rubric to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals."

[9] 49 U.S.C. § 41713(b)(1).

Western Air Lines, 658 F. Supp. at 958, *quoting British Airport Board*, 564 F.2d at 1011 (2nd Cir. 1977).

In the ADA, this concept of limited local authority was made explicit in Section 4(a)(1) and (3), which preempted state and local regulations relating to price, route or service of interstate air transportation, while recognizing the existence of traditional local "proprietary powers and rights." In the federal cases decided since enactment of the ADA, the exercise of those proprietary powers has been limited to cases of noise regulations, other legitimate environmental concerns, or demonstrated and documented situations involving groundside congestion of airports. *See, e.g., Alaska Airlines, Inc. v. Long Beach*, 951 F.2d 977, 984 (9th Cir. 1991) (allowing noise restrictions which did not "disfavor interstate commerce" and where benefits were not "illusory or insignificant"); *San Francisco v. FAA*, 942 F.2d 1391, 1396 (9th Cir. 1991) (disallowing noise restrictions as unjustly discriminatory, and noting that the FAA's interpretation of what constitutes unjust discrimination "will be upheld unless it is unreasonable"); *Western Air Lines v. Port Authority of New York and New Jersey, supra* (allowing 1500 mile perimeter rule at LaGuardia Airport, imposed by multi-airport proprietor,[10] in the interest of regulating ground congestion at the airport);[11] *Midway Airlines, Inc. v. County of*

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[10] Dallas is the proprietor of Love Field. It does not occupy a similar status with respect to DFW. *See* 202 F.3d 808, n.16 (FW Pet. App. 38).

[11] Contrary to the assertion in American's Petition (Am. Pet. 14), the rationale for the *Western Air Lines* decision was clearly the local interest in alleviating ground congestion. This is quite clear in the Second Circuit decision, which noted that the perimeter rule had been adopted "in order to reduce ground

Westchester, 584 F. Supp. 436 (S.D. N.Y. 1984) (allowing hourly limit on number of scheduled flights in light of compelling factual evidence of overcrowding of terminal). As the Second Circuit recently observed, an airport proprietor "may regulate only a narrowly defined subject matter – aircraft noise and other environmental concerns at the local level." *National Helicopter Corp. v. City of New York*, 137 F.3d 81, 89 (2nd Cir. 1998).

The Fifth Circuit's decision below is squarely within this tradition of the case law. Moreover, the court of appeals was careful to note that it was not attempting to chisel the list of proprietary rights in stone, holding that

> [t]he fact that the restrictions in the Ordinance do not advance a local interest articulated in prior case law is not dispositive. . . . We do not limit the scope of proprietary rights to those which have been previously recognized.

202 F.3d at 808 (FW Pet. App. 38).

Accordingly, the court of appeals was "open to assessing whether the restrictions in the Ordinance are

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congestion at LaGuardia." 817 F.2d at 222. The court then explained the reasoning that lead to the conclusion that a short-haul airport would have less congestion:

> The Authority believes that business travelers create considerably less airport congestion than vacationers and uses the perimeter rule to encourage the use of LaGuardia by business people, who often make relatively short trips. . . . *Id.*

Nothing in this decision conflicts with the Fifth Circuit's decision below. The Fifth Circuit does not deny the validity of a congestion-based restriction. 202 F.3d at 807 (FW Pet. 37). No one, however, has offered that as a reason for the restrictions on Love Field use in the Bond Ordinance.

reasonable and non-discriminatory rules aimed at advancing a previously unrecognized local interest." *Id.* However, those parties who now urge this Court to review the decision below because of its supposed dire consequences for the country as a whole, were unable to suggest to the Circuit a single good reason under the particular circumstances of this case for recognizing the power of a city to set routes as Fort Worth proposed that Dallas do.[12] *Id.*

In its Order 98-12-27, the DOT considered one possible justification for local restrictions on service, and in so doing struck at the heart of American's whole argument on the significance of the decision below. Just as in its petition to this Court, so in its DOT submissions, American argued that, if the Bond Ordinance could not be enforced to impose greater restrictions on Love Field air service than those authorized by federal law, it would

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[12] Proprietary powers may only be exercised by the actual airport proprietor. *See, e.g., City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973) (city noise ordinance by non-proprietor city preempted); *Burbank-Glendale-Pasadena Airport Authority v. Los Angeles,* 979 F.2d 1338 (9th Cir. 1992) (neighboring city had no authority to regulate airport of which it was not proprietor); *San Diego Unified Port District v. Gianturco,* 651 F.2d 1306, 1317 (9th Cir. 1981) (the entity which is the "owner, operator, and promoter" of the airport is its proprietor, and is the exclusive holder of whatever proprietary powers exist). An airport operator may not, as here, contract with a second airport proprietor to limit operations allowed by federal law at its own airport for the purpose of restricting competition. This would allow competing airport proprietors, by contracting to divide markets and restrict airline competition, to create an entire new class of "proprietary powers," borne exclusively of the desire for economic protectionism.

"frustrate efforts by other cities to create regional airports, efforts which assertedly require restrictions on airline service at existing airports." Order 98-12-27 (FW Pet. App. 92-93).

The answer to American's argument, given by the DOT in its Order, is also the answer to that same argument as made in American's Petition for a Writ of Certiorari. As the DOT noted,

> American's concerns are misplaced. Airport owners may be able to restrict service at one airport when necessary to ensure the survival of a second airport. *CF. City of Houston v. FAA*, 679 F.2d 1184 (5th Cir. 1982). The Department is not deciding here whether the Bond Ordinance's restrictions on Love Field service were valid when the cities originally built DFW to replace their local airports. The Department is interpreting the applicable federal statutes in this proceeding in light of the current situation, thirty years after the Bond Ordinance's adoption, when no one has cited evidence suggesting that expanded Love Field service along the lines permitted by the Shelby Amendment will undermine DFW's viability or end that airport's role as the area's primary airport.

Order 98-12-27 (FW Pet. App. 93).

American's only response to this entirely reasonable approach by the agency responsible for implementing federal aviation policy has been to express consternation that the reasonableness of a 1968 restriction should be judged in terms of present conditions. American has bemoaned this "shifting-sands ruling" (Am. Pet. 26), and asserted that it will undermine the certainty necessary for financing.

First, it should be noted that the evaluation by the DOT in 1998 of a restriction imposed in *1968* is more a matter of glacial movement than shifting sands. Financing in every enterprise is undertaken in light of the governing statutory framework, and that framework has existed under the ADA since at least 1978. The law even before deregulation required that all restrictions by an airport owner be reasonable;[13] and it is hardly reasonable to adopt American's rubric: When the reason for the rule ceases, the rule should go on anyway.

Analyzing the condition of DFW, now more than twenty-five years old and enjoying phenomenal success,[14] in terms of either a start-up airport or a failing one is ludicrous. Neither the DOT nor the Fifth Circuit made any decision that would foreclose local restrictions by a proprietor in the interest of a second start-up airport in an area, or that would prevent reasonable restrictions to save a failing established airport. Indeed, both are on record as suggesting the contrary proposition. Order 98-12-27 (FW Pet. App. 93); 202 F.3d at 808 (FW Pet. App. 37-38). However, those issues are not raised by this case

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[13] The DFW Airport has, in fact, flourished in the face of a string of federal court decisions, going back nearly thirty years, which have held that the Bond Ordinance cannot legally be enforced to exclude air service at Love Field as contemplated by its terms. The first such decision, recognizing Southwest's right to continue flying out of Love Field, came before DFW had even opened. *City of Dallas v. Southwest Airlines, Co.*, 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974).

[14] In 1997, DFW had 60.5 million enplaned passengers, while Love Field had 3.4 million. FW Pet. App. 112 (Order 98-12-27).

and would be before this Court only as a matter of speculation.

As to the necessity of resolving the "conflict" between the decisions below and the decision of the Colorado Supreme Court in *Arapahoe County Public Airport v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998), it is certainly true that the Fifth Circuit was concerned by the language of the Colorado opinion. Specifically, the court of appeals expressed the "fear that under the rationale of *Arapahoe*, virtually any regional regulation enacted by a proprietor would fall within the proprietary powers exception" to preemption under the ADA.[15] However, the Circuit also noted that *Arapahoe* was distinguishable from the present case. In the Colorado action, the court did not find the local airport restriction to be a regulation of "rates, routes or service," while clearly the Fifth Circuit did in the case here. Moreover, in *Arapahoe*, the local authority was enforcing a restriction on a kind of aircraft that had never used the airport in question in the first place. Love Field, the court of appeals noted in contrast, has always accommodated passenger planes of all types. 202 F.3d at 807, n.15 (FW Pet. App. 36-37).

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[15] 202 F.3d at 807 (FW Pet. App. 36). Subsequent to the decision of the Colorado Supreme Court in *Arapahoe*, the Federal Aviation Administration ruled, upon the complaint of Centennial Express Airlines, that the restrictions at issue in that case were, among other things, preempted under the ADA. *Centennial Express Airlines v. Arapahoe County Public Airport Authority*, FAA Docket No. 16-98-05 (August 21, 1998) (*aff'd*, FAA Order No. 1999-1, February 18, 1999), *petition for review pending* as No. 99-9508 (10th Cir. filed March 10, 1999). Any consideration by this Court of the issues raised by *Arapahoe* should come in the context of the decision of the Tenth Circuit.

Finally, as American itself notes, the decision in *Arapahoe* came in the context of restrictions involving Denver's *new* International Airport (Am. Pet. 12). The decision on Love Field came after more than a quarter century of operations out of the now well-established DFW International Airport. It also came after extensive federal legislation governing with great precision the permissible interstate flights out of Love Field.

Accordingly, *Arapahoe* and this case, however unlike in spirit, are distinguishable cases. Moreover, the unique character of Love Field, most particularly the specific attention accorded it by Congress in the Wright and Shelby Amendments, makes the present case a very poor choice should this Court be inclined to issue general instruction on the proper spirit to adopt in considering federal aviation preemption.

II. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR THE COURT'S CONSIDERATION OF THE SCOPE OF ADA PREEMPTION, BECAUSE OF THE UNIQUE ATTENTION OF CONGRESS TO LOVE FIELD.

At least with respect to the geographical scope of service described in subsection (c) of the Wright and Shelby Amendments, it is clear that Congress intended to occupy the field entirely, and to prescribe the precise air service which could be provided from Love Field. Congress' specific determination of this issue leaves no room for a more restrictive limitation by the City of Dallas. This conclusion is supported by the words of the Wright and Shelby Amendments themselves; by published legislative

history; and by the historical context in which the Amendments were adopted.

Subsection (c) of the Wright Amendment constitutes an affirmative *grant* of authority ("it is found consistent with the public convenience and necessity to authorize . . . "). As the Conference Report on the Wright Amendment specifically stated with respect to subsection (c):

> Subsection (c) provides that the CAB, or its successor agency is empowered to authorize an airline to provide service only between Love Field and points in Louisiana, Arkansas, Oklahoma, and New Mexico on a turnaround basis. The section also contains a congressional finding that such service, and only Love Field service of this limited scope, is consistent with the public convenience and necessity. While specific route applications to provide this service will be passed on by the CAB, the conferees intend that the Board will consider only whether the applicant is fit, willing and able to perform the proposed transportation, and whether such transportation is within the scope of authority granted by this legislation. We anticipate that the Board will act expeditiously on any such applications.

Senate Conference Report No. 96-531, 96th Cong., 1st Session, at 25.

With respect to the balance between federal preemption and local proprietary powers, the Wright Amendment Conference Report went on to state:

> The conferees state that the preemption and proprietary rights provisions of the Federal Aviation Act, sections 105(a) and (b), respectively,

> apply to the authority to serve Love Field on interstate flights authorized by the amendment.

Id. at 26. This language evidences a congressional intent to maintain the existing balance between the sections on preemption and proprietary powers insofar as they would affect operations at Love Field; and it makes the historical context of the rulings on Love Field service especially pertinent.

Some three months before the Wright Amendment was agreed to, the Civil Aeronautics Board had specifically decided how the preemption/proprietary powers balance must apply with respect to Love Field:

> D/FW, supported by American, argues that, in the exercise of its proprietary rights, confirmed by section 105(b)(1) of the Act, it may, in effect, veto certification of Southwest at Love Field. That argument is simply without merit. . . . Section 105(b)(1) was not intended to give airport operators additional proprietary rights, let alone veto power over Board decisions.

CAB Order 79-9-192 at 8-9 (Sept. 28, 1979).

Thus, in specifically authorizing service between Love Field and points within Texas, Louisiana, Arkansas, Oklahoma, and New Mexico, Congress understood that the exercise of proprietary powers could not be used "in effect, [to] veto certification of Southwest at Love Field." Congress could not have intended that its explicit finding that such service is "consistent with the public convenience and necessity" might be subject to review, modification, or rejection by a local airport proprietor. Indeed, if Dallas had the power in the exercise of its proprietary rights to deny access to Love Field for service authorized

by the Wright Amendment, there would have been no reason for the statute in the first place. For at the time of the Amendment, Dallas was in favor of no scheduled flights out of Love Field.[16]

When the 105th Congress undertook to amend subsection (c) of the Wright Amendment by adding the states of Kansas, Alabama, and Mississippi, it evidenced no intention to reduce the preemptive power of the affirmative grant of authority to provide service between Love Field and points within the designated states. The legislation itself states simply:

> (b) INCLUSION OF CERTAIN STATES IN EXEMPTION – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48 et seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas."

Public Law 105-66, § 337(b). The Shelby Amendment Conference Report is similarly brief and straightforward with respect to the modification of subsection (c):

> In addition, the conferees have added bill language including additional states to be covered under section 29(c) of the International Air Transportation Competition Act of 1979.

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[16] The Fort Worth parties attempt to avoid the obvious preemptive force of the Wright Amendment, which governed Love Field operations for nearly 18 years, by the bizarre argument that this act of Congress was really nothing more than a private agreement, a means of settling lawsuits, and, in effect, a novation of the original Bond Ordinance agreements. Federal statutes, of course, apply whether one has agreed to them or not.

Congressional Record, October 7, 1997, at H8603, H.R. Conf. Rep. No. 105-313 (1997).

In enacting this modification of subsection (c) in 1997, the 105th Congress did nothing to imply that it intended its actions to be any less preemptive than were the actions of the 96th Congress in enacting the original version of subsection (c). On the contrary, Congress' intent on both occasions was consistent: A carrier meeting the requirements of subsection (c) may provide service between Love Field and the states specified therein, without hindrance from the City of Dallas, the City of Fort Worth, the DFW Airport Board, or anyone else proclaiming themselves to be exercising "proprietary powers."

Given this unique situation involving Love Field, in which the proprietors' rights are specially and specifically restricted by targeted acts of Congress setting out restrictions and authorizations relevant to no other airport in the country, this case appears especially unsuited for the broad rulings called for by the petitioners here. The decision of the DOT that Dallas cannot forbid what the Shelby Amendment authorizes is correct for reasons in common with other airport situations – ADA preemption and the necessity of currently reasonable rules. But it is also correct for reasons peculiar to this one place. Those factors must inevitably be read together.

III. THE DOT HAD THE LEGAL AUTHORITY TO HOLD ITS INTERPRETATION PROCEEDING AND TO ISSUE DECLARATORY RULINGS ON THE QUESTIONS RAISED.

On May 25, 2000, the state district court summary judgment which Fort Worth argues should have precluded the DOT decision below was reversed and judgment was rendered by the Texas state court of appeals in entire agreement with the DOT and the Fifth Circuit on the pre-emption issue. Accordingly, if the DOT is bound by the Texas state court determination in Fort Worth's lawsuit, as Fort Worth argues here, it is now bound to decide against Fort Worth. This fact may well lessen petitioner's enthusiasm for preclusion. Certainly it is beyond question that the DOT had the authority to institute the proceeding below and to decide the federal law issues raised. As the District of Columbia Court of Appeals observed in reviewing the Department's previous administration of the Wright Amendment:

> Naturally, the administration and enforcement of a statute call upon the agency charged with its execution to interpret it.
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> * * *
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> Here, Congress fashioned a specific provision which the agency (once CAB, now DOT) has been called upon to interpret.

Continental Air Lines, Inc. v. Department of Transportation, 843 F.2d 1444, 1449 (D.C. Cir. 1988). This view is consistent with the teaching of this Court that "the Department of Transportation has regulatory authority to enforce the federal aviation laws." *Northwest Airlines, Inc. v. County of*

Kent, Michigan, 510 U.S. 355, 371 (1994). For the Department to hand over administration of a federal statute regulating air transportation to a state district court would turn principles of federalism, comity, and separation of powers on their heads.[17] Nevertheless, Fort Worth, alone in this Court, argues that the DOT was compelled either by the full faith and credit statute, 28 U.S.C. § 1738, or by federal common law rules of preclusion to follow the summary judgment decision of the Fort Worth state district court denying the applicability of federal preemption.[18]

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[17] See, for example, the recent Director's Determination in *Centennial Express Airlines v. Arapahoe County Public Airport Authority*, FAA Docket No. 16-98-05 (August 21, 1998), (*aff'd*, FAA Order No. 1999-1, February 18, 1999) at page 3:

> As an expert administrative agency, the FAA (along with the Secretary of Transportation (Secretary) in connection with certain economic issues) is charged with interpreting and implementing the Federal aviation statutes . . . Moreover, Federal courts, including the Supreme Court, have recognized the unique expertise of the FAA and the Secretary in interpreting the Federal statutory provisions at issue. *See New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989); *Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9 (1st Cir. 1987); and *Northwest Airlines, Inc. v. County of Kent, Michigan*, 510 U.S. 355 (1994). The FAA is not bound to follow the reasoning of the Colorado Supreme Court's decision and has conducted a *de novo* review of the matters raised in the complaint.

[18] Accordingly, were the Court to agree with Fort Worth now, the case would go back to the DOT, which would be compelled to enter precisely the same order it did in the first place on the basis of the state court of appeals judgment.

Fort Worth first asserts that, once the state district court had issued its Final Judgment on December 16, 1998, the DOT was required to defer to that judgment under 28 U.S.C. § 1738, a statute which requires federal *courts* to give the same full faith and credit to a state court judgment as would the courts of that state. Of course, by its terms this statute is inapplicable to the proceeding below and did not bar the DOT from issuing its Declaratory Order. The statute applies to "federal courts" rather than federal agencies. *NLRB v. Yellow Freight Systems, Inc.*, 930 F.2d 316, 320 (3d Cir. 1991) ("federal administrative agencies are not bound by section 1738 because they are not 'courts' "). Further, even if the statute did apply, it would not have given preclusive effect in the federal agency proceeding to the state court judgment, because that judgment is not binding on all interested parties under Texas law. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373 (1996) (the decision of a state court can have no more preclusive effect in any federal proceeding than it would have in a state action).

Neither the DOT nor Southwest was a party to the state court proceeding, nor were they in privity with any party; and thus they would not be bound by the state court's judgment under Texas law. *See, e.g., Dairyland County Mutual Ins. Co. v. Childress*, 650 S.W.2d 770, 774 (Tex. 1983). In fact, the state district court *denied, at the urging of Fort Worth,* motions to join Southwest Airlines and the DOT to the state court action on the grounds that they were not "persons who have or claim any interest that would be affected by the declaration."[19] Thus, no

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[19] Volume 10 of the Record on Appeal 110.

interest of Southwest Airlines could have been adjudicated and foreclosed in that state court proceeding to which it was not a party. Certainly, it makes no sense to hold that a federal agency should be crippled in the task of administering the laws placed in its charge by Congress as the result of litigation with limited impact even within its own jurisdiction.

In light of the important federal interests at stake in the administration of the aviation laws, the court of appeals declined to hold common law preclusion applicable either. Nothing in the cases cited by Fort Worth argues for a contrary result. Indeed, the four cases cited by Fort Worth in support of something like a full faith and credit requirement for state decisions in federal agency proceedings[20] only demonstrate how far Fort Worth is off the mark.

Bath Iron Works Corp. v. Director, OWCP, 125 F.3d 18 (1st Cir. 1997), concerns the preclusive effect of a state workers' compensation agency determination on the extent of an employees' disability in a subsequent federal claim for workers' compensation benefits under the Longshore Act. *Town of Deerfield v. FCC*, 992 F.2d 420 (2d Cir. 1993), is the Second Circuit's rejection of the FCC's attempt to use federal courts as screening panels for its disputes. The Circuit held that the FCC was bound by a prior *federal* court judgment, which was itself based on the res judicata effect of a state court suit. *Deerfield* is a decision made on the basis of Article III considerations which have nothing to do with the present dispute. 992 F.2d at 428. *Midgett v. United States*, 603 F.2d 835 (Ct. Cl.

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[20] FW Pet. 22.

1979), considered the effect of a state court adjudication of death on the Army's obligation to pay death benefits. Similarly, in *Torres v. Gardner*, 270 F. Supp. 1 (D.P.R. 1967), the issue was the effect on the award of Social Security benefits of a Puerto Rican court's determination of paternity.

In all of the three cases – *Bath Iron Works*, *Midgett* and *Torres* – that could be considered even remotely relevant here, the state tribunals were acting on traditional state law issues. They were deciding the extent of injury, the fact of death, and paternity. They were not attempting to interpret federal statutes, nor was anyone proposing that they could preclude the relevant federal agencies from administering and interpreting their statutes in proceedings involving other parties. Indeed, as the court acknowledged in *Midgett*:

> A judgment or decree of a state court whose effect would restrain the exercise of sovereign power of the United States by imposing requirements that are contrary to important and established federal policy would not be given effect in a federal court.

603 F.2d at 845.

Requiring the DOT to defer to decisions of state courts as Fort Worth argues would overturn years of orderly administration of the federal aviation laws and invite a Balkanizing of aviation decision-making through state and local court judgments. Such an outcome would turn long-established principles of federalism upside-down and wreak havoc with the centralized federal oversight that is essential for our national aviation system.

CONCLUSION

For the foregoing reasons, the Petition for Writ of a Certiorari of American Airlines, Inc. should be denied and the Petition for a Writ of Certiorari of the City of Fort Worth should be denied with respect to Questions 1 and 3.

Respectfully submitted,

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1. *The Wright Amendment.* Section 29 of the International Air Transportation Competition Act of 1979, Pub. L. 96-192, 94 Stat. 35, 48 (1980), provides:

> Sec. 29(a) Except as provided in subsection (c), notwithstanding any other provision of law, neither the Secretary of Transportation, the Civil Aeronautics Board, nor any other officer or employee of the United States shall issue, reissue, amend, revise, or otherwise modify (either by action or inaction) any certificate or other authority to permit or otherwise authorize any person to provide the transportation of individuals, by air, as a common carrier for compensation or hire between Love Field, Texas, and one or more points outside the State of Texas, except (1) charter air transportation not to exceed ten flights per month, and (2) air transportation provided by commuter airlines operating aircraft with a passenger capacity of 56 passengers or less.
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> (b) Except as provided in subsections (a) and (c), notwithstanding any other provision of law, or any certificate or other authority heretofore or hereafter issued thereunder, no person shall provide or offer to provide the transportation of individuals, by air, for compensation or hire as a common carrier between Love Field, Texas, and one or more points outside the State of Texas, except that a person providing service to a point outside of Texas from Love Field on November 1, 1979, may continue to provide service to such point.
>
> (c) Subsections (a) and (b) shall not apply with respect to, and it is found consistent with the public convenience and necessity to authorize, transportation of individuals, by air, on a flight

between Love Field, Texas, and one or more points within the States of Louisiana, Arkansas, Oklahoma, New Mexico, and Texas by an air carrier, if (1) such air carrier does not offer or provide any through service or ticketing with another air carrier or foreign air carrier, and (2) such air carrier does not offer for sale transportation to or from, and the flight or aircraft does not serve, any point which is outside any such State. Nothing in this subsection shall be construed to give authority not otherwise provided by law to the Secretary of Transportation, the Civil Aeronautics Board, any other officer or employee of the United States, or any other person.

2. *The Shelby Amendment*. Sections 337(a) and (b) of the Department of Transportation and Related Agencies Appropriations Act of 1998, Pub. L. 105-66, 111 Stat. 1425, 1447 (1997) provide:

SEC. 337(a) IN GENERAL. – For purposes of the exception set forth in section 29(a)(2) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94 Stat. 48), the term "passenger capacity of 56 passengers or less" includes any aircraft, except aircraft exceeding gross aircraft weight of 300,000 pounds, reconfigured to accommodate 56 or fewer passengers if the total number of passenger seats installed on the aircraft does not exceed 56.

(b) INCLUSION OF CERTAIN STATES IN EXEMPTION. – The first sentence of section 29(c) of the International Air Transportation Competition Act of 1979 (Public Law 96-192; 94

Stat. 48 et. seq.) is amended by inserting "Kansas, Alabama, Mississippi," before "and Texas".

3. *Airline Deregulation Act*. The pertinent paragraphs of Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978), as now codified at 49 U.S.C. § 41713(b), are as follows:

> (1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.
>
> * * *
>
> (3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

4. *28 U.S.C. § 1738*. Section 1738 of 28 U.S.C. provides in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Act, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

[SEAL]

COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-99-098-CV

Legend Airlines, Inc.; City of Dallas, Texas; Continental Airlines, Inc.; and Continental Express, Inc.	§	From the 48th District Court of Tarrant County (48-171109-97) May 25, 2000 Opinion by Chief Justice Cayce Dissent by Justice Dauphinot (p)
v.	§	
City of Fort Worth, Texas and American Airlines, Inc.	§	

JUDGMENT

This court has considered the record on appeal in this case and has determined that there is error in the trial court's judgment. We, therefore, order that the judgment of the trial court be reversed and that judgment be rendered denying the declaratory relief requested by appellees City of Forth Worth, Texas and American Airlines, Inc.

We also render judgment that the commuter airlines exception to the Shelby Amendment allows any airline operating any aircraft with a capacity of no more than 56 passengers and a gross weight of no more than 300,000 pounds to offer flights on that aircraft to or from Love Field without geographical limitation.

It is ordered that the appeal from the temporary injunction brought by Continental Airlines, Inc. and Continental Express, Inc. be dismissed.

It is further ordered that appellees City of Fort Worth, Texas and American Airlines, Inc. shall pay all of the costs of this appeal, for which let execution issue.

/s/